

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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| USTelecom Petition for Declaratory Ruling  | ) |                |
| That Incumbent Local Exchange Carriers Are | ) |                |
| Non-Dominant in the Provision of           | ) | WC Docket 13-3 |
| Switched Access Services                   | ) |                |
|  | ) |                |

**PETITION FOR RECONSIDERATION OF  
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

Pursuant to § 1.429 of the Commission’s rules, the Ad Hoc Telecommunications Users Committee (“Ad Hoc”) hereby submits this petition for reconsideration of the Commission’s Declaratory Ruling in the docket captioned above.<sup>1</sup> Ad Hoc seeks reconsideration of the Commission’s decision to re-classify ILECs as non-dominant in their provision of switched access services despite its failure to finalize access rate regulations for toll-free originating access minutes.

In its Declaratory Ruling that ILECs are non-dominant in their provision of switched access services, the Commission relied in part on the continuing applicability of certain regulatory protections for terminating access rates. But the Commission has

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<sup>1</sup> *USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services*, WC Docket 13-3, FCC 16-90 (rel. July 15, 2016) (“Declaratory Ruling”).

yet to act on its long-standing proposal to apply those same rate protections to originating access for toll-free service. The Commission must either (1) reconsider its decision to declare ILECs non-dominant or (2) act on its proposal to apply the same regulatory protections to the “open” end of a toll-free call as apply to terminating “sent paid” service.

## DISCUSSION

As the Commission previously observed in the intercarrier compensation proceeding,<sup>2</sup> the “open” or originating end of a toll-free call is the equivalent of the terminating end of a “sent paid” call. This is because, in both cases, the customer paying for the access service has no control over the choice of access provider at one end of the call. A toll-free service customer cannot control the *calling* party’s choice of LEC on the originating end of a toll-free call; a “sent paid” customer cannot control the *called* party’s choice of LEC on the terminating end of a call. As a result, the providers of both types of access service – terminating “sent paid” and originating toll-free – are insulated from any competitive forces that would otherwise ensure that providers charge just and reasonable rates. In both cases, regulatory intervention is necessary to correct a market failure and protect the access customer.

In its Declaratory Ruling granting the USTA Petition, the Commission premised its decision to reclassify ILEC switched access services as non-dominant on *inter alia*

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<sup>2</sup> *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663 (2011), *aff’d sub nom In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (“*USF/ICC Order and FNPRM*”) at 18111, para. 1303.

the fact that the Commission had, in the intercarrier compensation proceeding, imposed scheduled reductions in ILEC terminating access rates as part of a multi-year transition to a bill-and-keep regime.<sup>3</sup> Because ILEC pricing is constrained by those rate protections, the FCC reasoned, carriers cannot exercise their market power over terminating switched access services and therefore limited deregulation is appropriate.

The Commission's analysis in the Declaratory Ruling is sound, as far as it goes. But the Declaratory Ruling ignored the fact that the Commission has yet to act on its proposal to apply those same rate protections to access charges for the originating or "open" end of toll-free calls.

The Commission has long recognized the problem identified in the intercarrier compensation proceeding: access charges for the originating end of toll-free calls are not subject to competitive pressures and therefore require regulation to protect customers. The Commission's solution to that problem historically has been to apply the same access rate regime to originating toll-free minutes as it applies to terminating "sent paid" minutes. Indeed, the Commission determined 30 years ago that the originating end of a toll-free call is tantamount to the terminating end of a "sent paid" call because, in both cases, the payor cannot choose the access provider. Therefore, the Commission classified toll-free originating minutes as terminating minutes for access charge purposes and codified this decision in § 69.105 of its rules.<sup>4</sup>

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<sup>3</sup> Declaratory Ruling at 6-7, para. 15, and 13, para. 33.

<sup>4</sup> *WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, CC Docket No. 86-1, Report and Order, 1986 FCC LEXIS 3812 (1986), at 58, para. 53 (concluding that open end toll-free minutes must be treated as terminating access minutes); codified at 47 C.F.R. §69.105(b)(1)(iii).

The Commission reached the same conclusion again in its 1997 Access Charge Reform Order, where the Commission found that:

“[i]n some cases, an IXC [interexchange carrier] is unable to influence the end user's choice of access provider for originating access services because the end user on the terminating end is paying for the call. For example, charges for the ‘open end’ originating access minutes for 800 or 888 services are paid by the recipient of the call. Consequently, the Commission has treated incumbent LEC originating ‘open end’ minutes as terminating minutes for access charge purposes....

By continuing to treat ‘open end’ originating minutes as terminating minutes for access charge purposes, we recognize that access customers have limited ability to influence the calling party's choice of access provider. Accordingly, access charges for these ‘open end’ minutes will be governed by the requirements we adopt in this Order applicable to terminating access provided by incumbent LECs.”<sup>5</sup>

The rule applying the same rate protections to toll-free originating minutes and “sent paid” terminating minutes was mooted in 2000 when the CALLS order eliminated the price distinction between originating and terminating access minutes.<sup>6</sup> But when the intercarrier compensation proceeding reintroduced a rate differential between originating and terminating rates, it failed to revive the old rule treating toll-free (or “8YY”) originating minutes the same as terminating “sent paid” minutes for rate purposes. The Commission itself noted this disconnect in the *USF/ICC Order and FNPRM*:

In the case of 8YY traffic, the role of the originating LEC is more akin to the traditional role of the terminating LEC in that the IXC carrying the 8YY traffic must use the access service of the LEC subscribed to by the calling party. Stated differently, in the case of 8YY traffic, because the calling party chooses the access provider but does not pay for the toll

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<sup>5</sup> *Access Charge Reform*, CC Docket 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) at 16142, paras. 365 and 366.

<sup>6</sup> *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) at 12988-9, para. 70, and 12990, para. 75.

call, it has no incentive to select a provider with lower originating access rates. For this reason, we ask parties to address whether we should distinguish between originating access reform for 8YY traffic and originating access reform more generally.<sup>7</sup>

The pricing of toll-free access is of significant concern to enterprise customers like Ad Hoc's members because toll-free services constitute a substantial portion of the services they purchase. Toll-free services are also critical to public health and safety functions, such as product help lines, medical and pharmaceutical alert services, or credit card fraud resolution, as well as equally necessary but more routine customer service and product assistance.

In the absence of a Commission order restoring rate protections to originating toll-free minutes, the Commission's Declaratory Ruling is arbitrary and capricious. The Ruling concluded that, for terminating access minutes, continuing rate regulation was necessary because market forces cannot ensure just and reasonable rates when customers are powerless to select their providers. Yet customers of toll-free service face exactly the same market failure on the originating end of a toll-free call until such time as the Commission acts on this open issue in the intercarrier compensation docket. Pending action on the issue, the Commission cannot lawfully conclude that non-dominant regulation of ILECs' switched access service is in the public interest because that regulation leaves toll-free customers unprotected from a market failure that the Commission itself has recognized repeatedly.

Against this background, Ad Hoc respectfully requests that the Commission either reconsider its decision to declare ILECs non-dominant in their provision of access

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<sup>7</sup> *USF/ICC Order and FNPRM* at 18111, para. 1303.

services, or, more practically, restore the Commission's rule that applies the same rate protections to both originating toll-free access minutes and terminating switched access minutes.

Respectfully submitted,

**AD HOC TELECOMMUNICATIONS  
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### **Certificate of Service**

I, Amanda Delgado, hereby certify that true and correct copies of the preceding Petition for Reconsideration of the Hoc Telecommunications Users Committee was filed this 22nd day of August, 2016, via the FCC's ECFS system.



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